

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

SUSAN A. FITZWATER,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N09C-12-285-PLA
)	
STATE FARM MUTUAL AUTOMOBILE)	
INSURANCE COMPANY,)	
)	
Defendant.)	

Submitted: September 23, 2011
Decided: October 11, 2011

**UPON PLAINTIFF’S MOTION FOR NEW TRIAL
DENIED**

Plaintiff Susan Fitzwater brought this action against State Farm Mutual Insurance Company (“State Farm”) alleging that it failed to pay underinsured motorist (“UIM”) benefits in accordance with her automobile insurance policy for damages arising from personal injuries she sustained in an automobile accident on December 8, 2001. The underlying tortfeasor, Matthew Jackson, caused the collision when he failed to stop at a red light at the intersection of Delaware Routes 40 and 7. Fitzwater settled her claim against Jackson for the full limits of his policy and proceeded with this action for additional benefits from State Farm.

At trial, Plaintiff testified about the injuries she believed were directly caused by the accident. She also presented the testimony of Dr. James Downing, who did not begin treating her until several years after the accident occurred. Admittedly, the sole basis of Dr. Downing's opinion that Plaintiff's back pain was caused by the accident was his reliance upon Plaintiff's account to him that her low back pain followed the accident.

At trial, State Farm did not concede that Fitzwater suffered any injury as a result of the accident. In so doing, State Farm did not present any independent evidence but instead relied upon vigorous cross-examination of the Plaintiff and her doctor, medical records that contradicted some of Plaintiff's contentions, and other facts that were presented to discredit Plaintiff's theory that all of the residual pain she suffered for the past ten years was related to the accident. In essence, State Farm put the Plaintiff to her burden of proof and relied upon the inadequacy of Plaintiff's evidence in order to prevail.

State Farm's strategy proved to be highly effective. Even though State Farm did not call any of its own witnesses, the jury concluded that Plaintiff did not sustain her burden by proving that her injuries were proximately caused by the accident by a preponderance of the evidence. Accordingly, the jury awarded her zero damages.

Plaintiff has now filed a Motion for New Trial wherein she claims that “the question presented to the jury was not whether the plaintiff was injured but the extent of her injuries,” and that the evidence was “uncontroverted” that Plaintiff was injured as result of the accident.¹ Plaintiff submits that, “[w]here the evidence conclusively establishes the existence of an injury . . . a jury award of zero damages is against the weight of the evidence and it is an abuse of discretion to deny a new trial.”²

Standard of Review

The standard of review on a Motion for New Trial is well settled. The jury’s verdict is presumed to be correct and just, and is afforded great deference by the Court.³ In the absence of exceptional circumstances, the Court will yield to the jury’s verdict when reviewing a motion for new trial, and the amount of damages determined by the jury, if any, will likewise be presumed to be valid.⁴ The Court may not alter a jury’s factual findings so long as there is “any competent evidence upon which the verdict could reasonably be based,” and will not alter a verdict unless “a reasonable jury could not have reached the result.”⁵

¹ Pl.’s Mot. for New Trial 1.

² *Id.* at 2.

³ *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. 1975).

⁴ *Mitchell v. Haldar*, 2004 WL 1790121 at *3 (Del. Super. Aug. 4, 2004).

⁵ *Town of Cheswold v. Vann*, 9 A.2d 467, 473–474 (Del. 2010).

Analysis

While Plaintiff asserts that the evidence that Plaintiff was injured as a result of the accident was uncontroverted, the Court does not agree. The fact that State Farm offered no medical testimony in support of its position does not automatically mean that the Plaintiff's medical opinion must be accepted by the jury. Indeed, the jury instructions specifically direct the jury to give whatever weight and credit to an expert's opinion that it deems appropriate and to disregard any testimony that it does not believe, considering all of the factors and circumstances that could affect the credibility of the testimony. In short, the jury was not required to accept *any* of Dr. Downing's opinions even if he was the only medical expert presented at trial.

In this case, the jury could have easily discounted Dr. Downing's opinion that Plaintiff's back pain was caused by the accident. He did not begin treating Plaintiff until at least three years after the accident, was not provided with any of Plaintiff's pre-accident medical records prior to reaching his opinion, and did not have access to many of the Plaintiff's post-accident medical records, with the exception of another physician's 2004 report, a 2004 lumber MRI report, and a physician's 2010 record, all of which were at least three years after the accident. Dr. Downing was thus forced to acknowledge that his causation opinion was based substantially, if

not entirely, upon Plaintiff's own rendition to him that her low back pain began after the accident. Dr. Downing had no records proximal to the date of the accident and thus no documented evidence linking Plaintiff's symptoms to the accident. Dr. Downing also admitted that he could not determine the age of Plaintiff's disc degeneration simply by examining the MRI, nor could he determine from the MRI whether the degeneration was accident-related.

Moreover, in several respects, Plaintiff's own testimony did a disservice to her case with regard to causation. She testified that she did not have any physical complaints at the scene of the accident and did not seek medical attention until two weeks after the accident when she saw an orthopedist for a left elbow (not back) complaint. In fact, Plaintiff's complaints of low back pain—for which she specifically sought damages in this suit—are not even documented until two months after the accident when she was seen by a physical therapist. That two-month gap could cause any reasonable jury to question whether the accident caused her injuries, especially when the physical therapy records also contain a notation that Plaintiff's complaints were related to poor posture, rather than to the accident.

Plaintiff's credibility, or at least her insistence that her back pain was causally related to the accident, was also undermined by the fact that for nearly a two-year period, between April 2002 and March 2004, she did not seek any treatment for her back while at the same time she did frequently seek medical attention for other minor conditions. Her testimony regarding her inability to perform routine physical activities was also undermined by medical records that demonstrated that she regularly worked out at a gym. Perhaps even more damaging was a June 28, 2006 record from Rehabilitation Consultants wherein Plaintiff reported that her low back pain started "recently."

Furthermore, Plaintiff's reliance upon the case of *Maier v. Santucci*⁶ is misplaced. The Supreme Court in that case reversed and remanded for a new trial, finding the jury's award of zero damages inadequate. The testifying physicians for both plaintiff and defendant in the *Maier* case opined that the plaintiff had suffered an injury as a result of the accident, but these opinions were based on objective tests and not exclusively on the plaintiff's unsubstantiated report to her doctor several years after the accident, as was the situation here. The jury in this case was free to

⁶ 697 A.2d 747 (Del. 1997).

disregard Dr. Downing's opinion if it did not credit the plaintiff's testimony upon which that opinion was based.

Given these circumstances, a jury could reasonably find that Plaintiff's back pain was not caused by the 2001 accident. Likewise, Dr. Downing's opinion to that effect could reasonably be disregarded since it was based upon history given by the Plaintiff herself, and her credibility was successfully challenged by the defense during cross-examination.

Contrary to Plaintiff's statements in her brief, the evidence was not uncontroverted regarding the central issue in the case—causation—and State Farm's strategic decision to forego presenting its own medical evidence did not mean that the jury had to accept Dr. Downing's opinion. That opinion could easily be disregarded by the jury if it disbelieved the Plaintiff leaving the Plaintiff without any credible causation evidence to sustain her burden of proof.

The relief that Plaintiff requests requires the Court to discount the jury's considered view of the facts, its credibility assessments, and its opinions as to the weight to be given to the testimony of the witnesses. For the Court to deem the verdict so inadequate as to require a new trial it would have to conclude that the jury returned a verdict that is contrary to the weight of the evidence. This verdict is not and it should therefore stand.

Accordingly, Plaintiff's Motion for New Trial is **DENIED**.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary

cc: R. Stokes Nolte, Esquire
Sarah B. Cole, Esquire